

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

NIPPON SHINYAKU CO., LTD.,
Plaintiff,

V.

SAREPTA THERAPEUTICS, INC.,
Defendant.

C.A. No. 21-1015 (JLH)

SAREPTA THERAPEUTICS, INC. and THE
UNIVERSITY OF WESTERN AUSTRALIA,
Defendant/Counter-Plaintiffs

V.

NIPPON SHINYAKU CO., LTD. And NS
PHARMA, INC.,
Plaintiff/Counter Defendants.

**NS'S RESPONSE TO *DAUBERT* MOTION NO. 2
TO EXCLUDE DR. ESAU'S NON-INFRINGEMENT OPINION AND TESTIMONY**

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Defendant NS Pharma, Inc.*

Dated: January 12, 2024

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Defendant-Counterclaim Plaintiffs Sarepta Therapeutics, Inc. and the University of Western Australia’s (together, “Sarepta”) motion to exclude the opinions and testimony of Nippon Shinyaku Co. Ltd. and NS Pharma’s (collectively, “NS”) expert Dr. Christine Esau related to infringement of the UWA Patents should be denied. Sarepta’s motion is based solely on its position that Dr. Esau failed to properly apply the Court’s claim construction ruling in setting forth her opinions. D.I. 395 at 9-10. Sarepta’s argument is simply wrong. As set forth in detail in NS’s Response to Sarepta’s Motion for Summary Judgment No. 1, filed herewith, Dr. Esau correctly and faithfully applied the Court’s claim construction. In fact, it is Sarepta’s analysis that is demonstrably inconsistent with the Court’s claim construction, as discussed in NS’s Response to Sarepta’s Motion for Summary Judgment No. 1. Because Dr. Esau’s opinions adhere faithfully to the Court’s construction, there is no basis to exclude them.

Moreover, Sarepta argues that Dr. Esau’s opinion should be excluded as “contributing to improper jury confusion” as “inconsistent with the construction of NS’s validity expert, Dr. Hastings.” D.I. 395 at 10. However, the approach of providing alternative theories—including “arguments analyzed under an opposing party’s interpretation of the claims”—has been expressly permitted by this Court.

Future Link’s concerns that Intel’s infringement position is inconsistent with its licensing defense, and further, that Intel’s experts only analyzed commercialization under Future Link’s interpretation of the claims, do not entitle it to summary judgment. As the Court previously noted ... such alterative arguments, and arguments analyzed under an opposing party’s interpretation of the claims, are permissible.

Intel Corp. v. Future Link Sys., LLC, 268 F. Supp. 3d 605, 614 (D. Del. 2017).

For these reasons, the Court should deny Sarepta’s motion to exclude Dr. Esau’s opinions.

Dated: January 12, 2024

Respectfully submitted,

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